Supreme Court, U.S.
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No. 85-1315

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WARREN KOSHER and CHRISTINE KOSHER,

Petitioners,

vs.

TIMMY STAMATIS and LISA STAMATIS,

Respondents.

BRIEF OF RESPONDENTS ADOPTIVE PARENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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On the Brief

42 pp

QUESTIONS PRESENTED

1. Should the Court grant a Writ of Certiorari, when the case does not present important constitutional issues for review and where the result reached by the unanimous Court of Appeals was correct and based upon substantial evidence?

2. Should the Court grant a Writ of Certiorari, when the petitioners' claims of invalid waiver and standing arise from their purposeful ignorance and deliberate indifference to the law?

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STATEMENT OF THE CASE

This represents yet another attempt by the petitioners to up-root MARISA STAMATIS(formerly "Sarah K.")from the only home and family she has ever known. MARISA is a very special child and TIMMY and LISA STAMATIS, her adoptive parents,[1] are very special people who are uniquely equipped to provide MARISA with the love and care she requires.

MARISA was born to the petitioners on November 6, 1983 with Down's Syndrome, the most commonly recognizable cause of serious mental retardation. MARISA's birth parents, petitioners herein, rejected her because of her limitations.

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1. Marisa's adoption was granted by the Suffolk Family Court on Dec.12,1985 after Petitioners request for a stay was denied by the Court of Appeals. Petitioners failed to seek a stay from this Court.

They refused counseling from the hospital staff as well as from meetings with parents with children with Down's Syndrome(A-3,n.1). Petitioners did not want MARISA because she would interfere with their lifestyle and homelife and was beyond a doubt a burden that they did not wish to assume(A-88). The petitioner father is a seasoned trial attorney and his wife, a business executive. They also had their own counsel available to them. They are certainly the elite of litigants[2] to claim lack of intelligent and knowing waiver of legal rights.

Petitioners' rejection of MARISA was complete and unequivocal. When Mrs. K

2. Compare them with Mrs. Fuentes, Fuentes v Shevin, 407 U.S.67 (1972), or with Mr. Johnson, Johnson V. Zerbst, 304 U.S. 458 (1938).

left the hospital on November 7, 1983, MARISA remained behind unwanted, unloved unvisited. All petitioners energies were expended in finding a way to be rid of MARISA. Thus, they contacted public agencies to have her placed for adoption, but decided private placement adoption would be quicker(A-3,4). Fortunately for MARISA, Timmy and Lisa Stamatis, were trying to adopt a handicapped child. Timmy is a waiter and Lisa is a full time homemaker.[3] On November 11, 1983, Mr. Kosher gave MARISA to the STAMATISES to adopt as their own.

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3. Dr. Herbert Cohen, former Vice-Chairman of the President's Committee on Mental Retardation and national authority on pediatric retardation, testified that "she is one of the most remarkable parents that I have ever seen with a handicapped child." 1A

Petitioners were given both judicial and extrajudical consent to adoption forms. The former is valid and irrevocable only if executed before a judge, which it was not. The latter is irrevocable 30 days after the adoption proceeding is commenced. Petitioners paid scant attention to these forms.They did not bother to read them carefully nor to have their own lawyer review them or explain them. They simply stuck these important documents in their desk where they remained for several weeks. When they did look at them, petitioners spent no more than "two minutes", then signed both forms.(A-6). Petitioners did not have to sign either or both.

Petitioners inserted a phrase which destroys their claim of lack of

knowledge and of being mislead as to the documents import. To the extrajudicial consents they had added:

> "We came to our decision to place our baby for adoption because of her Down's Syndrome condition and our belief that the [Stamatises] are far more capable of dealing with this condition and raising the child than we are." (emphasis added) A-7.

The adoption proceeding was filed on December 16, 1983. More than 30 days later on January 23, 1984, petitioners were notified that the adoption had been filed. Petitioners conveniently omitted the significant part of the notice that their attorney received from their brief. As the Court of Appeals noted, the Notice was entitled:

> "Subject: ADOPTION OF SARAH KOSHER, by Stamatis, Docket No. A-25-84." (A-36)

More than 30 days later on February 28, 1984, the petitioners changed their minds and signed a Notice of Revocation. The petitioners resort to a revocation of consent form demonstrated a recognition of the operative effect of the extrajudicial consent, and not, as they claim, confusion stemming from execution of dual forms. (A- 37,92).

Contrary to the tone and inferences of the petition, they never waivered nor evidenced any hesitation about the adoption nor gave any consideration to revocation before February 28, 1984. In the intervening days and months following their signing the extrajudicial consents, petitioners did not express the slightest interest in nor concern for MARISA's health, care or well being. In fact, all

the judges--Family Court, Appellate Division(5), and Court of Appeals(7)--Appeals(7)--agreed petitioners meant to give Marisa away for adoption. They only differed as to how final the decision was.

It is not only difficult, but impossible to reconcile the petitioners legal argument with the actual behavior. Their behavior clearly demonstrated their knowing and intelligent determination to have MARISA adopted and to be relieved of all legal and economic responsibility for her care as soon as possible.

Yet, petitioners persist in their claim that they were mislead by their signing both forms. There is simply nothing in the record to support their subjective state of mind. Just the contrary is true. The revocation form they filed on February 29 only pertains to the extra- judicial consent forms.

The record only supports the conclusion that at the time they signed these consents they wanted nothing more than to rid themselves of their parental rights.

It is even more difficult and quite impossible to conclude given the petitioners background, experience and conduct that they were somehow denied Due Process. Both the petitioners are intelligent, well educated individuals with the money, knowledge and means to understand their rights.

In addition, they had legal counsel and the resources of Mr. K's law firm behind them. Mr. K's law partner clearly represented them at each important stage of the proceedings. Their claim that he was acting only as a friend is specious. He filed an affidavit with the court representing himself as their attorney.

He also communicated with the court and with the Stamatises attorney on the petitioners behalf. Petitioners want the Court to blink at these facts and ignore the obvious.

FAMILY COURT PROCEEDINGS

Bifurcated hearings were held in Family Court on petitioners charge that the consents were invalid due to duress, irregularities of the placement, lack of counsel, and assorted constitutional claims(none of which included invalid waiver). The Family Court rejected all these charges except one constitutional claim. The trial judge held that they could have been mistaken as to when the 30 day revocation period began and held that strict enforcement of the statute would not be appropriate. The remedy was

to treat the revocation as timely and to hold a best interests hearing.

After hearing the testimony of some 28 witnesses at the best interest hearing, the trial judge concluded that adoption by the Stamatises was in MARISA's best interests.

APPELLATE DIVISION DECISION

Appellate Division divided in three directions. The plurality agreed with the trial court except on standing. The plurality held the petitioners confusion was limited solely to the question of the time that they had to revoke the extra-judicial consent form.(A-56). But, it found that petitioners had standing to challenge the notice provisions and held the statute unconstitional on its face. The concurring opinion held that the petitioners were confused about their right of revocation and declared their

consents a nullity. The concurrence declined to hold the statute unconstitutional on its face.

The dissent held petitioners lacked standing and agreed with the trial judge that the actions of the petitioners demonstrated that the extrajudicial consent was "knowingly and voluntarily executed." The dissent also held that the trial court's conducting a best interests hearing eliminated any injustice caused by petitioners' confusion over their time to file a notice of revocation.

COURT OF APPEALS DECISION

The Court of Appeals unanimously reversed, without reaching the constitutional issues raised by petitioners which were the same they raised below. The Court of Appeals held that the petitioners confusion about the

time to file a revocation resulted from their own actions and was not caused by either the Stamatises or by the adoption consent forms(A-37-39). Petitioners subjective confusion resulted from their glancing at the forms for no more than two minutes and signing both forms together. Having failed to file their revocation within 30 days of the notice from the adoption court on January 23, 1984, they lacked standing to challenge the statute's notice provisions and were bound by their consent.

The Court of Appeals, however, read the statute to require that notice of the filing of the adoption would commence the time period for revocation and to require that extrajudicial consent forms notify the biological parent of their limited right of revocation.

Petitioners are quite wrong when

they state that this case provides the Court with the opportunity to clarify what process is due when a parent disputes the validity of their consent to the adoption of their child.

This case does not in any broad sense concern due process violation. It involves purely issues of fact. The questions raised in the petition turn on the particular facts of this case alone and are of interest only to the parties to it. In essence, petitioners asks this Court to make a third review of the lengthy recordto see if it can find what New York's entire Court of Appeals was unable to find---any reason to deny de jure recognition to this de facto family.

Fact canvassing is not a task to be served by a grant of certiorari. The present case raising as it does questions turning entirely on facts

already resolved twice(i.e. in the trial court and Court of Appeals)in favor of MARISA's adoption by the STAMATISES, and without impact outside the limits of this particular case, certiorari should be denied.

POINT I

THIS CASE DOES NOT PRESENT IMPORTANT CONSTITUTIONAL ISSUES FOR REVIEW.

Petitioners have gone to great lengths to instill this otherwise private domestic dispute with constitutional significance it does not really possess. This Court has previously addressed and enunciated the prerequisites for waiver of a fundamental right. It need not do so once again simply because the waiver has occurred in the context of a private adoption. To the contrary, further dissertation of waiver in such limited context will neither be illuminating nor especially beneficial since adoption is purely a creature of statute whose procedures widely differ from state to state.

New York's unanimous Court of

Appeals did not even address the issue of waiver, but rather concerned itself with petitioners' standing to raise constitutional claims under the peculiar and unique facts of this case. The issue of waiver has only now appeared in an attempt to skirt their lack of standing. It scarcely bears mentioning that the Court should not review this case from the point of view of waiver when the court below never had that issue raised, and thus, no opportunity to address it.

Regardless of whether the petitioners claims are addressed in the context of standing, as we believe they should, or in terms of waiver, as the petitioners press, the outcome is the same: certiorari should be denied. In either case, the only real questions petitioners raise turn on the peculiar facts of

this case alone and are of interest only to the parties to it.

In essence, petitioners ask the Court to make a third review of the lengthy trial record to see if it can find what New York's unanimous Court of Appeals has been unable to find--proof that the petitioners did not intentionally relinquish their parental rights to Marisa. Such fact canvassing is not a task to be served by a grant of certiorari. U.S. v Johnson, 268 U.S. 220 (1925).

Petitioners contention that they did not knowingly and intelligently waive their parental rights is at odds with the uncontroverted facts. Their actions belie their claims and are consistent with a knowing and intelligent intention to rid themselves permanently of any and all parental responsibilites for Marisa.

First of all, petitioners independently concluded they did not want to be Marisa's parents shortly after her birth. Every court below has agreed that their decision to have Marisa quickly adopted was calculated and without reservation. Second, petitioners sought and arranged for the Stamatises to adopt Marisa and physically accomplished the adoptive placement. Third, they were totally commited to the adoption from birth on November 6, 1983 until February 28, 1984 when they decided to change their minds. During this interval the trial court found that petitioners decision to have her adopted was "unwavering" and ratified by each passing day.

> "There is absolutely nothing to suggest that they would not have signed the consent had they fully understood the revocation procedures. In fact, the evidence demonstrates precisely the

> contrary. Their sole concern until late in February 1984, was to have the adoption consumated so they could proceed with their lives. Their decision to sign the extrajudcial consent form was not induced or in any way influened by the now challenged failure of the form to fully describe their rights."
> (emphasis added) A-157

Fourth, the petitioner father is a seasoned trial lawyer, while his wife is an experienced business woman. They are concededly astute, sophisticated and well educated. Additionally, they had an attorney (although they repeatedly denied this), plus all the resources of the petitioner's law firm available at each step along the way. Petitioner father despite his legal skills never bothered to read the statute or to ask his attorney to read it. Instead, the

petitioners kept their own counsel and insisted on proceeding on their own terms. When given the extrajudicial consent forms, they stuck them in their desk for two weeks without bothering to read or even look at them. When they did look at them, they spent no more than two minutes glancing at them and then unhesitatingly signed them. Moreover, they insisted on inserting additional language which unequivocally signaled their relinquishment of all parental rights:

> "[We] came to our decision to place our baby for adoption because of her Down's Syndrome condition and our belief that the [Stamatises]are far more capable of dealing with this condition and raising the child then we are."
>
> (emphasis added) A-7

It is impossible to conclude in the face of these actions and admissions that they did not knowingly and intelligently

waive their parental rights. In the realm of factual review and analysis, the rulings of the court below are treated with and entitled to great weight. In the present case, petitioners raise only questions turning entirely on the facts of this case, already resolved twice in favor of the Stamatises adoption of Marisa and without impact outside the limits of this case. Certiorari should therefore be denied.

POINT II

PETITIONERS PURPOSEFUL IGNORANCE AND DELIBERATE INDIFFERENCE TO THE LAW AND TO THEIR ADOPTION CONSENTS MAY NOT BE USED AS A DEFENSE TO WAIVER NOR AS A BASIS FOR STANDING.

Petitioners' argument is one which excuses purposeful ignorance and rewards negligence, and will lead to the impos-

ition of Miranda warnings to private civil proceeding before an intelligent and knowing waiver could ever be found. The sad fact of the matter is that the petitioners refuse to accept any responsiblity for their actions.

Petitioners alleged confusion stemmed from the negligent manner in which they read and handled the consents to adoption forms. They do not controvert the trial court and Court of Appeals findings that they spent no more than "two minutes reading the adoption consent forms" before signing them, and that they never made any inquiry of their own attorney nor the Stamatises' attorney nor of anyone else about the legal import of the documents before signing them nor in the three months that followed.

They signed both extrajudicial and judicial consents together. They need not have signed either or both. They did

so in their haste in finalizing the adoption. Any mistaken impression or confusion that they labored under clearly springs from their own negligence and indifferent attitude about the consents.

What petitioners seek here is a new constitutional right-- the right to be excused from all personal responsibility for their actions. Accepting such an argument will not bode well for the many handicapped youngsters who are desperately seeking an adoptive home and for whom a life of institutional care is the dreadful alternative. See, N.Y.S. Assn. for Retarded Children, Inc. v Rockefeller, 357 F. Supp. 2d 752(E.D.N.Y.1973).

The determination of whether there was an intelligent waiver of a constitutional right depends upon the "particular facts and circumstances surrounding that case, including the background, experience and conduct of the

accused." Johnson v Zerbst, 304 U.S. 458, 464(1938). Given the sophistication intelligence and available legal counsel that the petitioners had, it cannot be said that they did not know or should not have known the legal import of their actions.

Petitioners cannot plead ignorance of the law and of what lawyers acting for them knew or should have known. The Court in Lehr v Robertson, 463 U.S. 248(1983) rejected the claim that a layman and his non-adoption expert attorney could not be expected to be aware of the statutory procedures for registering his interests in and objection to an adoption, noting that lay persons are presumptively capable of acting in such matters for themselves. Lehr v Robertson,supra at 265,n.23. If a lay person cannot excuse his failure to act in an adoption by his ignorance of the law, an attorney such as Mr. K trained to

do legal research cannot found a defense to his failure to act in a truly timely manner on not having read the statute.

POINT III
CERTIORARI SHOULD BE DENIED SINCE THE CORRECT RESULT WAS REACHED BY THE UNANIMOUS COURT OF APPEALS AND WAS BASED ON SUBSTANTIAL EVIDENCE.

Hopelessly forgotten in the petition is Marisa's best interests. Marisa is now almost two and a half years old. She truly knows no other home or parents than the Stamatises. Petitioners are virtual strangers to her and to her daily regimen. She has been legally adopted into and become an integral part of the Stamatises family. If certiorari were to be granted Marisa's entire life and family will be once again plunged into turmoil, and a

dark pall cast over her future, and that of countless other handicapped children for whom adoption is their only chance for real parents and family life(see, Affidavit of Margaret Soule, 4A).

There is something morally repugnant and manifestly unjust in petitioners argument that they did not knowingly intend to waive their parental rights when they so thoroughly and calculatingly rejected Marisa for what she is and set about expediting her adoption. For example, petitioners refused to even see Marisa at the hospital to avoid any attachments and never held her except for the limited purpose of handing her over to the Stamatises for adoption.

The transparency of the petitioners claim of lack of knowledge is most clearly illuminated by the language they inserted in the extrajudicial consent:

> "We came to our decision to place our baby for adoption because of her Down's Syndrome condition and our belief that the petitioners[i.e.Stamatises] are far more capable of dealing with this condition and raising the child than we are."
> (A-7)

It is difficult, if not impossible to reconcile petitioners present argument with their actions then.

There is a paramount right at stake here and it is MARISA's protected interest in and right to stability and continuity in her relationship with her adoptive parents. Petitioners claim to her is a proprietary one which treats her as their chattel. We believe that if mere impregnation is not enough to convert a biological fact into a constitutionally protected interest(Lehr v Robertson, 463 U.S 248(1983), and if a protected interest arises from "emotional attachments that derive from the intimacy of daily associations"(Smith v O.F.F.E.R.,431 U.S.

843, 844(1977), then petitioners efforts to wrench MARISA from all that is familiar to her must fail and certiorari denied.

POINT IV

THE PETITIONERS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE OR ITS APPLICATION TO THEM.

It is fundamental that consitutional issues are to be avoided when the resolution of them is not necessary for the disposition of a case. In re Synder,105 S.Ct. 2874(1985); Three Affiliated Tribes of Fort Berthold Res.v World Engineering, P.C., 104 S.Ct. 2267(1984).

Petitioners do not have standing to raise a constitutional defect in a statute if that defect did not harm them. U.S. v Raines, 362 U.S.17(1965); Broc-

Kett v Spokane Arcades Inc., 105 S. Ct. 2794(1985); Allen v Wright, 104 S.Ct. 3315, reh.denied, 105 S. Ct. 51(1984).

It was the unanimous holding of New York Court of Appeals that petitioners lacked standing to challenge the constitutionality of section 115-b D.R.L., because petitioners failed to revoke their consent within thirty days of their receipt of actual notice of the commencement of the adoption, and thus, could not claim that they were injured by the limited effect of a timely revocation.

Petitioners do not challenge New York's power to require that any revocation be made within thirty days nor the substantive standards governing revocation proceedings. Petitioners concede that it was their decision alone to place Marisa for private adoption and that they rejected all offers of counseling.

It is truly irrelevant whether the petitioners understood the limited right of revocation since they failed to exercise the right of revocation within the prescribed time period of which they had clear notice. The absence of information from the consent which, if it occured, is of no moment since they failed to take the necessary action during the time that they knew they had to act. Thus, they were not injured by the alleged deficiencies of the form.

> "Birth parents obviously would have no standing to complain that the consequences of a timely revocation were omitted from consent forms if they were otherwise fully informed of those consequences (See, Matter of Daniel C., supra),or if they made no effort to revoke consent within 30 days of notification of the adoption proceeding. In either case absence of information from the form would not have affected them." A-36.

Certiorari, must therefore, be denied.

CONCLUSION

In 1972 New York enacted section 115-b Domestic Relations Law to reform statutory and decisional law in the wake of the infamous "Baby Lenore" case (Peo.ex rel. Scarpetta v Spence-Chapin Adoption Ser., 28 N.Y.2d 185, 192, app. dsmd sub nom DeMartino v Scarpetta, 404 U.S. 805. The statute was to provide stronger guarantees of the permanence of child adoption arrangements.

> "The uncertainty under which the adoptive parents are now required to live cannot but adversely affect the relationship between them and the child during the period prior to the actual adoption.... The broad damage that was done by the recent cases was to strike terror in the hearts of prospective adoptive parents and actually discourage other parents from entertaining adoption."A-18. (emphasis added)

Granting certiorari in this case will

adversely impact on the far too many handicapped children so in need of a permanent and loving adoptive home. For all of the reasons stated herein, the respondents, TIMMY STAMATIS AND LISA STAMATIS, respectfully urge that the petition for a writ of certiorari be denied and their family remain intact.

Respectfully submitted,
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APPENDIX

[Excerpt from trial transcipt pages 1784-1785;testimony of Dr. Herbert Cohen]

A. I have a very, very strong opinion, and it is unequivocal in this case. I spent about an hour and three quarters with Mrs. Stamatis and I felt that, as I said before, she is one of the most remarkable parents that I have seen with a handicapped child. She has dedicated herself to the care of this child and the other child in her home. She has done all the right things that I can see in the management of this child. She is totally and absolutely committed to trying to maximize the potential of this child within realistic boundaries and she has given this child the love and affection and care as much as anyone can expect of a parent of a disabled child. Therefore, I feel that with regard to parenting skills, for a child with Down's Syndrome, they are exceptional.

STATE OF NEW YORK
COURT OF APPEALS

AFFIDAVIT

In the Matter of Sarah K.

(Anonymous)

STATE OF NEW YORK)
:ss.:
COUNTY OF MONORE)

MARGARET A. SOULE, being duly sworn, deposes and says:

1. I am the Executive Director of The CAP Book, Inc., a New York Not-For-Profit Corporation, and a subsidiary of The Council of Adoptive Parents, Inc., alsc a New York Not-for-Profit Corporation.

2. The CAP Book, founded in 1972, is a photo-listing service and adoption advocacy group, which seeks adoptive parents for children with special needs, including those with physical and mental and emotional handicaps.

3. The CAP Book is almost entirely supported through individual contributions and grants from private foundations, including the Gannett Foundation.

4. The CAP Book publishes a three volume set of books of pictures of children waiting for homes. Many are minority and most are "special needs" children, that is, they have one or more serious physical, mental, or emotional handicaps.

5. The CAP Book also acts as an adoption advocacy support group, giving lectures and workshops across the state and country. I am pleased to say that our organization enjoys a state-wide and even national reputation in the adoption field. We regularly receive phone calls and letters from adoptive parents and groups across the state asking for our expertise and experience.

6. I know from first hand experience how difficult it is to find homes for "special needs" children. Of the approxmately 900 children listed in our books last year only about 250 found adoptive parents.

7. My husband and I have adopted six children, including a youngster who is mentally retarded and one who was severely emotionally disturbed.

8. I have been Executive Director of the CAP Book for eight years, and I talk annually in person and over the phone with hundreds of adoptive parents.

9. As adoption advocates, the CAP Book staff, board, and I speak out regularly through addresses to groups and interviews with media on adoption issues.

10. The CAP Book seeks leave to appear as amicus curiae in this appeal because of the importance of the issues raised to adoptive parents and especially

older children. The CAP Book is especially concerned about the implications of this Court's decision for the children whose adoptive placements may be disrupted and who may be forced to move to another home with all the psychological damage which can result.

11. We have been informed of the expedited schedule of this appeal and the limited financial resources of the adoptive parents herein, and are concerned that these important issues may not be adequately presented to this Court for determination. We submit that the CAP Book can be of assistance to this Court by filing its brief drawing the Court's attention to law and arguments which might otherwise escape consideration, assisting the parties in a full and adequate presentation of the matter. The CAP Book can also be of special assistance to the Court in presenting the

adoptive child's point of view.

12. The CAP Book has secured the services in this effort of Harris, Beach, Wilcox, Rubin and Levey, Joyce R. Parker, of counsel, pro bono (without charge for legal fees).

13. This is the first request of The CAP Book to appear as amicus curiae in this matter. Granting this relief will not delay this appeal, because twenty copies of our completed Brief are submitted herewith and have been served on attorneys of record herein, as demonstrated by our affidaivt of service filed herewith.

WHEREFORE, I respectfully request that this Court grant the motion of The Cap Book to appear amicus curiae to submit its Brief to this Court, and grant such other and further relief as this Court deems appropriate.

Margaret A. Soule

Sworn to before me

this 17 day of September 1985.

S/

Notary Public

JOYCE R. PARKER

Notary Public in the State of New York

Monroe County

Commission Expires March 30,1985